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Supreme Court, U.S.
FILED

991424 FEB 23 2000

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

QUENTIN WILSON, Director,
Department of Revenue of the State of Missouri,
Petitioner,
v.
BURLINGTON NORTHERN
SANTA FE RAILWAY COMPANY,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Missouri imposes 4.225% sales and use taxes on purchases by and from businesses, including purchases of fuel. It exempts from those taxes purchases of fuel that are covered by an alternative 17¢ per gallon excise tax, and purchases of fuel by waterborne vessels while on navigable rivers. And it imposes a ceiling on taxes on the purchase of jet fuel by airlines. The question in this case, brought by a railroad taxpayer, is:

Whether, under Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11501(b)(4), a railroad becomes exempt from generally applicable state sales and use taxes on fuel purchases when a state grants other carriers exemptions from those particular taxes?

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PETITION FOR WRIT OF CERTIORARI

Quentin Wilson, Director of the Department of Revenue of the State of Missouri, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on October 22, 1999.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit is reported at *Burlington Northern Santa Fe*

Ry. Co. v. Lohman, 193 F.3d 984 (8th Cir. 1999), and is reprinted in the Appendix at page A-1. The order of the U.S. District Court for the Western District of Missouri is not reported, but is reprinted in the Appendix at A-7 The order of the Court of Appeals denying rehearing is reprinted in the Appendix at A-27.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on October 22, 1999. The motion for rehearing or rehearing en banc was denied on November 26, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS

49 U.S.C. § 11501 (Supp. II 1996):

(a) In this section--

> (1) the term "assessment" means valuation for a property tax levied by a taxing district;
>
> (2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;
>
> (3) the term "rail transportation property" means property, as defined by the [Surface Transportation] Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section--

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

MO.REV.STAT. § 142.803.1 (Cum. Supp. 1999):

A tax is levied and imposed on all motor fuel used or consumed in this state as follows:

(1) Motor fuel, seventeen cents per gallon . .

.

MO.REV.STAT. § 142.815.1 (Cum. Supp. 1999):

Motor fuel used for the following nonhighway purposes is exempt from the fuel tax imposed by this chapter. . . .

> (3) Diesel fuel used as heating oil, or in railroad locomotives or any other motorized flanged-wheel rail equipment, or used for other nonhighway purposes other than as expressly exempted pursuant to another provision.

MO.REV.STAT. § 144.020.1 (Cum. Supp. 1999):

A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

> (1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to four percent of the consideration paid or charged. . . .

MO.REV.STAT. § 144.030.2 (Cum. Supp. 1999):

> There are also specifically exempted from the provisions of . . . sections 144.010 to 144.525 and 144.600 to 144.745:
>
> (1) Motor fuel or special fuel subject to an excise tax of this state, . . .
>
> (26) Sales of fuel consumed or used in the operation of ships, barges, or waterborne vessels which are used primarily in or for the transportation of property or cargo, or the conveyance of persons for hire, on navigable rivers bordering on or located in part in this state, if such fuel is delivered by the seller to the purchaser's barge, ship, or waterborne vessel while it is afloat upon such river.

MO.REV.STAT. § 144.805.1 (Cum. Supp. 1999):

> In addition to the exemptions granted pursuant to the provisions of section 144.030, there shall also be specifically exempted from the provisions of sections 144.010 to 144.525. . .
>
> . . . all sales of aviation jet fuel in a given calendar year to common carriers engaged in the interstate air transportation of passengers and cargo, and the storage, use and consumption of such aviation jet fuel by such common carriers, if such common carrier has first paid to the state of Missouri, in accordance with the provisions of this chapter, state sales and use taxes pursuant to the foregoing provisions and applicable to the

> purchase, storage, use or consumption of such aviation jet fuel in a maximum and aggregate amount of one million five hundred thousand dollars of state sales and use taxes in such calendar year.

STATEMENT OF THE CASE

Missouri imposes sales and use taxes of 4.225% of the purchase price on all persons purchasing or consuming personal property in the state. MO.REV.STAT. § 144.020; 144.610.1.[1] Like all sales and use tax statutes, Missouri's includes a number of exemptions. Three were invoked by respondent Burlington Northern Santa Fe Railroad Co. ("Burlington Northern") in this suit.

First, Missouri exempts the sale of "[m]otor fuel or special fuel subject to a [Missouri] excise tax." *Id.* § 144.030.2(1). That exemption thus applies to the sale of "all motor fuel used or consumed in this state." *Id.* § 142.803.1(1) (Cum. Supp. 1999). Purchasers of such fuel -- who include Burlington Northern's principal non-rail competition -- pay an excise tax of 17¢ per gallon, rather than the 4.225% sales tax. Railroads are expressly exempt from the excise tax. *Id.* § 142.815.1(3) (Cum. Supp. 1999).

Second, Missouri exempts the sale of aviation jet fuel to a common carrier after that common carrier has paid $1.5 million in a calendar year. *Id.* § 144.805.1.

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[1] The base 4% is set in the referenced statutes. Additional taxes of .125% and .1% are imposed pursuant to Missouri Constitution art. IV § 43(a), § 47(a). Those conservation taxes are imposed on the same terms as the base tax.

And third, Missouri exempts the sale of fuel delivered to "ships, barges, or waterborne vessels . . . on navigable rivers." § 144.030(26).[2]

Burlington Northern filed suit against imposition of the sales and use tax, invoking § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act (4-R Act), 49 U.S.C. § 11501(b)(4). That section prohibits the states from imposing taxes that discriminate against a common carrier by rail. Burlington Northern sought to enjoin the Director of the Missouri Department of Revenue from collecting unpaid sales and use taxes on Burlington Northern's purchase and consumption of gasoline and diesel fuel in Missouri that is used for rail transportation purposes.[3]

On cross motions for summary judgment, the district court granted judgment for the Director. Considering the dual Congressional objectives of fostering competition between railroads and other common carriers and giving railroads

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[2] The term, "navigable rivers," is not defined in the statute. Its use in Missouri tax law began, however, before statehood: "[T]he river Mississippi, and the *navigable rivers* and waters leading to the same, shall be common highways, and forever free, as well to the inhabitants of the said state as to other citizens of the United States, *without any tax*, duty, impost or toll therefor imposed by the said state." Act of Admission, March 6, 1820, *reprinted at* MO.REV.STAT. v. 7 p. 8227 (1994) (emphasis added).

[3] At the time Burlington Northern filed suit, the Director of the Department of Revenue was Janette Lohman. Since that time, she has been replaced by Quentin Wilson. Under Fed.R.Civ.P. 25(d), he was automatically substituted as the defendant below and, consequently, is the petitioner in this Court.

equal, but not preferential tax treatment, the court compared railroads to two classes of taxpayers: all other taxpayers who pay the sales and use taxes; and railroads' competitors. (A-18.)

Asking whether Missouri's sales and use tax was targeted at railroads, the district court found that Missouri's sales and use taxes, paid by more than 80,000 businesses, are instead generally applicable. (A-23 - A-24.) The district court noted that Missouri provided exemptions to those taxes, but held that Missouri's exemptions are not illegally discriminatory because the 4–R Act does not expressly prohibit the states from carving out exemptions from their sales and use taxes. (A24 - A25.) Mindful that the 4–R Act impinges upon the states' sovereign power of taxation, the court concluded that federalism requires that the Act not be extended beyond its evident scope. (A-24 - A-25.)

Turning to the relative impact of Missouri sales and use taxes on transportation modes, the court held that Missouri does not single out railroads from among their competitors for illegally discriminatory taxation. (A-18 - A-21.) Because the 17¢ per gallon excise tax paid by motor carriers was more than four times the 4.225% sales and use taxes on fuel paid by railroads, the court concluded that Missouri favors the railroads, rather than the trucking industry. (A-19.) Because Burlington Northern admitted that airlines are not a significant competitor and presented no evidence that any railroad pays more than $1.5 million per year in taxes on fuel, the court concluded that the slight tax preference given to airlines is not significant as well. (A-20.) That left exempt from taxation on fuel only watercraft -- i.e., barges -- purchasing fuel while on navigable rivers. But the district court held that because Missouri's sales and use taxes are generally applicable, the exemptions from the sales and

use taxes for motor carriers, barge lines, and airlines are not illegally discriminatory. (A-20 - A-21.)

The court of appeals, by contrast, compares railroads only to their direct competitors -- and even then used a very narrow approach. (A-5.) The appeals court reasons that Congress intended to permit using more than one comparison class under § 11501(b), and that using all other taxpayers as the comparison class under § 11501(b)(4) would not promote restoration of railroad financial stability. (A-4.) Because trucks and barges are not subject to Missouri's generally imposed sales and use taxes, the court concludes that railroads are placed at a competitive disadvantage. (A-5.) In addition, following an Eighth Circuit precedent that it interprets to absolutely forbid consideration of even parallel taxes, the court refuses to take into account Missouri's excise tax on fuel of 17¢ per gallon. (A-5 - A-6.) The court holds that Missouri's 4.225% sales and use taxes on fuel discriminate against railroads and violate the 4-R Act. (A-6.)

REASONS FOR GRANTING THE WRIT

In deciding that Missouri's sales and use tax exemptions discriminate against railroads, the Court of Appeals for the Eighth Circuit implicitly holds that states do not have the same ability to grant tax exemptions under 49 U.S.C. § 11501(b)(4) as they do under § 11501(b)(1), (2), and (3). The court explicitly holds that to determine whether a tax is discriminatory, the proper comparison class for § 11501(b)(4) consists only of the railroads' direct competitors -- again, unlike the comparison classes used for § 11501(b)(1), (2), and (3). Those holdings directly conflict with the holdings of the Ninth Circuit in *Atchison, Topeka &*

Santa Fe Ry. Co. v. Arizona.[4] Moreover, their application here results in the curious and significant rule that a state cannot choose parallel modes for taxing competing industries -- a rule that, when applied as in this case, results in discrimination in favor of railroads. This Court should grant the petition and both resolve the conflicts between the Eighth and Ninth Circuits and decide whether Congress reduced state tax sovereignty so as to prevent the states from using parallel taxes on comparable transactions in a fashion that compels discrimination in favor of the railroads.

I. The Eighth and Ninth Circuits give conflicting answers to the question, "Can states exempt non-railroads from otherwise generally applicable sales and use taxes without violating § 11501(b)(4), as they can do for property taxes under § 11501(b)(1), (2), and (3)?"

Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act (4-R Act), 49 U.S.C. § 11501(b)(4) (Supp. II 1996), prohibits the states from imposing taxes that discriminate against a common carrier by rail. In *ACF Industries*, this Court held that Congress placed exempt property beyond the reach of subsection (b)(4), making a tax on railroad property not even subject to challenge on the ground that other classes of commercial and industrial property are exempt.[5] The Court based its holding on two

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[4] 78 F.3d 438, 443 (9th Cir.), *cert. denied sub nom. Arizona Cent. R.R. v. Arizona*, 519 U.S. 1029 (1996) (*ATSF (Arizona)*).

[5] *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 338–39, 343 (1994) (*ACF Industries*).

considerations: the structure of § 11501 as a whole; and the principles of federalism.

Both of the direct conflicts between the Eighth and the Ninth Circuits arise in the context of considering the structure of § 11501 as a whole. The Ninth Circuit treats § 11501(b) as one piece, with the same foundational rules applicable to all four of its subparts. The Eighth Circuit, by contrast, assigns one foundation to § 11501(b)(1), (2), and (3), but moves (4) to quite a different place. This Court should resolve those conflicts to enable the states to determine, as they structure their tax codes, just where they can build.

The first conflict appears in the courts' contrasting treatment of states' use of exemptions to tailor particular taxes. This Court held in *ACF Industries* that despite the broad prohibitions in the four subsections of § 11501(b), the states may grant exemptions from a generally applicable property tax without invalidating railroad taxation under any of its subsections.[6] Under subsections (b)(1)-(3), taxation of railroad property is compared to taxation of other "commercial and industrial property," which is defined in subsection (a)(4) as property "subject to a property tax levy." This Court observed that the term property "subject to a property tax levy" in subsection (a)(4) could bear one of two interpretations -- taxed property or taxable property, including property that is taxable but currently exempt.[7] This Court held that property "subject to a property tax levy" means taxed property.[8]

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[6] *ACF Industries*, 510 U.S. at 340.

[7] *ACF Industries*, 510 U.S. at 341.

[8] *ACF Industries*, 510 U.S. at 342.

That holding was consistent not only with the structure of § 11501, but with the principles of federalism. States have traditionally granted a wide range of exemptions from generally applicable property taxes. There is no clear and manifest purpose in § 11501 to impinge upon or pre-empt the states' traditional power to grant property tax exemptions.[9] Thus, the Court held, the states have been permitted to grant such exemptions without invalidating railroad taxation under subsection (b)(4), despite the absence of any language in any part of § 11501(b) that expressly permits exemptions.[10]

The Eighth Circuit implicitly recognizes the states' ability to grant exemptions from property taxes (A-4, n. 2), but effectively denies them the ability to grant exemptions from other taxes. It can not suggest that states have not traditionally granted a wide range of exemptions from sales and use taxes. It does not identify any purpose, much less a clear and manifest purpose, in § 11501 to impinge upon the states' power to grant such exceptions. Instead, the Eighth Circuit simply jumps past the "exemption" analysis to reach its result.

By contrast, the Court of Appeals for the Ninth Circuit directly addresses the "exemption" analysis of *ACF Industries* in the context of sales and use taxes and applies that analysis consistently to all subparts of § 11501(b). The Ninth Circuit concludes that "the logic advanced by the Supreme Court is equally applicable to the context of transaction privilege tax and use tax exemptions."[11] And the Ninth Circuit concludes that if Congress intended to restrict the states' power to

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[9] *Id.*

[10] *ACF Industries*, 510 U.S. at 344–45.

[11] *ATSF (Arizona)*, 78 F.3d at 443.

exempt non-railroad businesses from sales and use taxation, Congress would have done so explicitly.[12]

States in the Ninth Circuit can thus exempt classes of purchasers from generally applicable sales or use taxes without also exempting railroads. States in the Eighth Circuit cannot. This Court should grant the petition in order to eliminate that inequity.

II. The Eighth and Ninth Circuits give conflicting answers to the question, "What is the proper 'comparison class' when considering whether a state tax has discriminated against railroads in violation of § 11501(b)(4)?"

If a court is to determine whether any tax is discriminatory, it must decide which classes of taxpayers to compare. The second point at which the Eighth and Ninth Circuits diverge is in deciding what "comparison class" to use when addressing a claim that nonproperty taxes are illegally discriminatory under (b)(4).

Rather than look to all other commercial and industrial taxpayers, the Eighth Circuit uses the competitive mode comparison class. Thus, although the Missouri sales and use tax is applied to "a vast number of Missouri businesses" (A-2), the court focuses only on how the tax was applied to competitive transportation modes (A-5). And it looks only at the application of the tax to fuel, not its application to other purchases even by transportation competitors. The court feels compelled to go that direction by what it describes as the "broader purpose" of the statute, *i.e.*, the desire "to restore the railroads's financial stability." (A-4.)

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[12] *Id.*

The Ninth Circuit finds a narrower statutory purpose -- one more consistent with principles of federalism -- and thus took a road to a quite different comparison class. According to that court, the purpose of § 11501 is to "remedy discrimination against railroads and place them on an even playing field with other state taxpayers."[13] It is not to grant railroads "preferential treatment."[14] And to judicially grant a railroad what amounts to a tax exemption by declaring a particular generally applicable state tax to be illegally discriminatory is to "mandate preferential treatment favoring it over similarly situated taxpayers."[15] Subsection (b)(4) "merely protects railroads from discrimination, rather than conferring on them a right to be treated like the most favorably treated taxpayer."[16]

The Ninth Circuit reasons that in order for railroads to receive equal treatment with other taxpayers subject to the same tax law, railroads "must be compared with all others subject to the tax in question, not just compared to motor carriers."[17] A "narrow comparison class," consisting of only some of the taxpayers subject to the tax law, would result in preferential treatment for the railroads.[18] The Ninth Circuit

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[13] *ATSF (Arizona)*, 78 F.3d at 442.

[14] *Id.*

[15] *CSX Transp. Inc. v. Tennessee State Bd. of Equalization*, 801 F.Supp. 28, 35 (M.D. Tenn. 1992).

[16] *ACF Industries*, 510 U.S. at 352 (Stevens, J., dissenting).

[17] *ATSF (Arizona)*, 78 F.3d at 442.

[18] *Id.*

thus holds that railroads should be compared to all other taxpayers subject to Arizona's transaction-based privilege and use taxes.[19]

States in the Ninth Circuit can thus consider all commercial and industrial taxpayers, and all of their purchases and sales, when deciding whether an exemption from sales and use taxes for one type of transaction for one industry will violate § 11501(b)(4). States in the Eighth Circuit, by contrast, are limited to a very narrow focus: they must look, in this instance, only at purchases of fuel and only at transportation companies that compete directly with railroads. This Court should grant the petition in order to eliminate that inequity.

III. The Eighth Circuit's decision presents an additional and important question of federalism, "Whether Congress has eliminated the states' ability to use parallel means to tax the same transaction by different transportation modes?"

The Eighth Circuit requires that the court focus on a single tax with a specific label, rather than look at the transaction being taxed and consider parallel taxes that are imposed on the same type of transaction. The Eighth Circuit's decision thus strikes a serious blow against the states' ability to structure taxation to address differences among competitors and among similar transactions. Here, that choice resulted in railroads being excused from paying a 4.225% sales tax on the purchase of fuel, largely because their principal competitor, the trucking industry, instead pays a 17¢ per gallon excise tax on its fuel purchases. The Eighth Circuit relied on its holding in *Trailer Train (Missouri)*, which prohibited district courts from determining the "actual

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[19] *Id.*

discriminatory effect" state taxes have on railroads.[20] But the Eighth Circuit carries the *Trailer Train* rule too far. Under the guise of relieving district courts of the obligation to engage in detailed factfinding when considering a discrimination claim, the Eighth Circuit prohibits them from considering even parallel taxes to determine facial discrimination.

Missouri's sales and use taxes do not facially discriminate against railroads, as *Trailer Train (Missouri)* held Missouri's private car tax did. The private car tax was imposed only upon a single taxpayer -- freight line companies.[21] But Missouri's sales and use taxes are imposed upon all persons purchasing or consuming personal property or services in the state.[22] Moreover, exempting motor carriers from the 4.225% sales and use taxes on fuel,[23] but subjecting them to a 17¢ per gallon excise tax on fuel, [24] does not facially discriminate against railroads.

On the face of its statutes, Missouri discriminates in *favor* of railroads. As the district court observed, trucks pay about four times more tax per gallon on fuel than railroads pay. (A-19). Congress could not have intended for that to be

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[20] *Trailer Train Co. v. State Tax Comm'n of Missouri*, 929 F.2d 1300, 1302 (8th Cir.), *cert. denied*, 502 U.S. 856 (1991) (*Trailer Train (Missouri)*).

[21] *Id.*

[22] MO.REV.STAT. § 144.020.1(1) (Cum. Supp. 1999), § 144.610 (1994).

[23] MO.REV.STAT. § 144.030.2(1) (Cum. Supp. 1999).

[24] MO.REV.STAT. § 142.803.1(1) (Cum. Supp. 1999).

ignored. Thus the Ninth Circuit does not ignore that motor carriers in Arizona, though exempt from the transaction privilege and use taxes on fuel, pay a different tax when they buy fuel.[25] Nor does the Minnesota Supreme Court, in holding very recently that sales and use taxation of railroad purchase and consumption of fuel in Minnesota is not discriminatory under subsection (b)(4), ignore the contrast between the 2.6¢ to 4.2¢ per gallon sales and use taxes paid by railroads on fuel and the 20¢ per gallon excise tax paid by motor carriers.[26] Neither the Ninth Circuit nor the Minnesota Supreme Court answers the "actual discriminatory effect" question that the Eighth Circuit proscribed in *Trailer Train*. But that does not prevent them from reading related parts of the tax code rather than wearing blinders.

The Eighth Circuit, by blinding itself to even the black letters of Missouri's tax code, eliminates the requirement that railroads in Missouri pay any tax on fuel, while leaving in place a higher tax paid by railroads' main competitor. That is preferential, not equal, treatment. And it is mandated by a rule that would in essence preclude a state from taxing fuel purchases at the retail pump through a different mechanism than it uses to tax bulk purchases by railroads and other industrial users.

This Court should grant this petition and consider whether the states can still use different approaches to calculating taxes on such parallel transactions. In doing so, the Court may protect the railroads as much as the states. For unless the decision is reversed, the only practical alternative for states in the Eighth Circuit may be to impose the higher

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[25] *ATSF (Arizona)*, 78 F.3d at 439-40, 443.

[26] *Burlington Northern R.R. Co. v. Commissioner of Revenue*, 2000 WL 124669, at *8 (Minn.Sup.Ct. 2000).

excise tax on railroad purchases of fuel -- a result that cannot be reconciled with the Eighth Circuit's own description of the purpose of the 4-R Act: "to restore the railroads's financial stability." (A-4).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1027

Burlington Northern, Santa Fe Railway Company,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court for the Western
Janette M. Lohman, Director, Department of Revenue of the State of Missouri,	*	District of Missouri.
Appellee.	*	

Submitted: September 15, 1999

Filed: October 22, 1999

Before BEAM, HEANEY, and FAGG, Circuit Judges.

BEAM, Circuit Judge.

Burlington Northern Santa Fe Railway Company (Burlington Northern) appeals the district court's holding that the State of Missouri did not violate 49 U.S.C. § 11501(b)(4) of the Railroad Revitalization and Regulatory Reform Act (the 4-R Act) by discriminating against the railroads with sales and use taxes on fuel. Although we find the district

court seems to have used the proper comparison class, we find that it improperly reviewed the entire state tax structure to determine if discrimination had occurred. Accordingly, we reverse.

I. BACKGROUND

The State of Missouri imposes upon a vast number of Missouri businesses[1] either a sales or a use tax of 4.225 percent on the retail price of items purchased or consumed in the state. Burlington Northern is a common carrier by railroad engaged in interstate commerce operating in Missouri. Missouri imposes sales and use taxes on Burlington Northern for the diesel fuel and gasoline it purchases and consumes in the state, but its major competitors, trucks and barges, are exempt from such taxes under Missouri Annotated Statute §§ 142.362(9), 144.030(26) (1996 & Supp.1999). Trucks, however, are subject to a fuel excise tax of seventeen cents that is paid at the fuel pump. Barge lines apparently pay no similar taxes of any kind.

Burlington Northern stopped paying the taxes in 1995. It contends that the taxes violate the 4-R Act. Burlington Northern asserts that these taxes, as applied to fuel, are discriminatory because they treat the direct competitors of the railroads preferentially.

Burlington Northern filed this action in the district court for declaratory and injunctive relief. On motions for summary judgment, with both parties agreeing there are no material issues of fact, the court granted summary judgment to the state. Burlington Northern appeals, asserting that the district court was unclear in its choice of a comparison class

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[1]Presently the number is approximately 80,000.

and that it improperly found that the sales and use taxes as applied to fuel did not violate the 4-R Act.

II. DISCUSSION

The 4-R Act proscribes four taxing practices that "unreasonably burden and discriminate against interstate commerce." See 49 U.S.C. § 11501(b). First, railroad property may not be assessed at a higher ratio to its true market value than other commercial and industrial property. See 49 U.S.C. § 11501(b)(1). Second, a tax may not be levied on an assessment referred to in (b)(1). See 49 U.S.C. § 11501(b)(2). Third, a jurisdiction may not collect an *ad valorum* property tax on railroad property if the tax rate is higher than that for commercial and industrial property in the same jurisdiction. See 49 U.S.C. § 11501(b)(3). Fourth, Congress added a catchall provision that prevents the imposition of "another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). We must decide the proper comparison class for a nonproperty tax under the catchall provision and whether the entire state tax structure may be examined to determine if such a tax is discriminatory.

Under the first three subsections of the statute that deal exclusively with property taxes, Congress specifically provided a comparison class comprised of "other commercial and industrial property." 49 U.S.C. § 11501(b)(1-3). It did not provide such a comparison class for the catchall provision. See 49 U.S.C. § 11501(b)(4). Thus, there are two possible comparison classes to choose from: (1) the competitive mode class, which is comprised of the railroads's direct competitors, or (2) the "other commercial and industrial taxpayers" class furnished by the property tax subsections. See Atchison, Topeka & Santa Fe Ry. Co. v. Arizona, 78 F.3d 438, 441 (9th Cir.1996). With respect to the Missouri

sales and use taxes at issue here, we find that a comparison class of competitors is more appropriate.

This comparison class dilemma is the result of a statutory omission. The rules of statutory construction dictate that words should not be supplied to a statute when the words are purposefully omitted or when adding words would defeat the purpose of the statute. See id. at 445 (Nielsen, J., dissenting), see also 2A Norman J. Singer, Sutherland Statutory Construction: Statutes and Statutory Construction § 47.38 (5th ed. 1992). We find both of these reasons present with respect to the catchall provision.

First, Congress demonstrated that it knew how to provide for a specific comparison class when it wanted one as demonstrated by the three property tax provisions. Second, the purpose of the catchall was to prevent discriminatory taxation in any form and to cover a wide variety of taxing techniques. See Ogilvie v. State Bd. of Equalization, 657 F.2d 204, 210 (8th Cir.1981); Alabama Great Southern R.R. Co. v. Eagerton, 663 F.2d 1036, 1040 (11th Cir.1981).

Therefore, the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case.[2] The broader purpose of the 4-R Act, to restore the railroads's financial stability, also supports this

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[2]For example, in the property tax setting, the Supreme Court had to be mindful of the three property tax subsections when analyzing the thrust of the catchall It did not want to subvert the statutory plan by preventing the state from using a taxing technique under the catchall that would be permissible under one or more of the three property tax subsections. See Department of Revenue v. ACF Indus., Inc., 510 U.S. 332, 340-41 (1994).

reading. See Department of Revenue v. ACF Indus., Inc., 510 U.S. 332, 336 (1994). Stability cannot be restored without making the railroads competitive.

Considering both the statutory plan and the purpose of the statute, we assume Congress intended to omit a specific comparison class from the catchall. If Congress had wanted this subsection to have the same comparison class as the property tax subsections, and none other, it would have written it that way. See Arizona, 78 F.3d at 445 (Nielsen, J., dissenting). It did not.

In this case, the railroad companies are subject to a generally imposed nonproperty tax, while their direct competitors are not. If too broad of a comparison class is chosen, the railroads will be placed at a competitive disadvantage that would defeat the purpose of the statute--financial stability. See id.; see also Burlington Northern R.R. Co. v. Commissioner of Revenue, 509 N.W.2d 551, 553 (Minn.1993); Atchison, Topeka & Santa Fe Ry. Co. v. Bair, 338 N.W.2d 338, 346 (Iowa 1983). Additionally, "[t]he broad comparison class overlooks the obvious point that a tax imposed on rail carriers, but not on motor carriers [or water carriers], is discriminatory in the most basic sense of the word--it treats those engaged in an identical activity differently." Arizona, 78 F.3d at 446 (Nielsen, J., dissenting). Therefore, we hold that the proper comparison class for Missouri sales and use taxes is the competitive mode. Both sides agree that the railroads's competitors are barges and trucks.

We next address whether the tax is discriminatory. Burlington Northern argues that only the sales and use taxes should be taken into account to determine if those sales and use taxes are discriminatory. We agree. In Trailer Train Co. v. State Tax Comm'n, 929 F.2d 1300 (8th Cir.1991), we held

that a state's overall tax structure need not be examined under the 4-R Act even if fair taxing arrangements exist, such as taxing one business with property taxes and another with sales taxes, " 'because the actual fairness of those arrangements is too difficult and expensive to evaluate.' " Id. at 1303 (quoting Kansas City Southern Ry. v. McNamara, 817 F.2d 368, 375 (5th Cir.1987)). We thus look only at the sales and use tax with respect to fuel to see if discrimination has occurred. See Trailer Train, 929 F.2d at 1303. Within the competitive mode class, only railroads pay the tax. Barges and trucks are exempt. Accordingly, we hold that Missouri's sales and use tax on fuel violates the 4-R Act.

III. CONCLUSION

Therefore, we reverse the district court's holding that the tax did not discriminate and we remand to the district court with instructions to enter declaratory and injunctive relief in favor of Burlington Northern consistent with this opinion.

A true copy.

Attest:

CLERK U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,	)	
Plaintiff,	)	
v.	)	Case No. 97-4211-CV-C-5
JANETTE LOHMAN, Director, Department of Revenue of the State of Missouri,	)	
Defendant.	)	

ORDER

The issue in this case is whether Missouri's sales and use tax discriminates against railroads. Most businesses in Missouri, including railroads, pay this tax; however, the railroads' main competitors (trucks and barges) are exempt from it. Burlington Northern Santa Fe Railway Company ("BNSF") alleges that by giving these exemptions to their main competitors while imposing the tax on railroads, the State of Missouri has discriminated in violation of the Railroad Revitalization and Regulatory Reform Act ("the 4-R Act"), 49 U.S.C. §§ 11501 to 11502 (1997).

The Plaintiff brings this action against the Director of the Department of Revenue of the State of Missouri ("the Director"), and seeks injunctive and declaratory relief from the tax being levied, assessed, or collected. The Plaintiff also requests the Court to order the Defendant to pay its court

costs. Pending before the Court are fully-briefed cross motions for summary judgment. The parties agree that there are no material facts in dispute, and that the case is ripe for judgment as a matter of law. [*Compare* Def's Mot. at 1 *with* Pl's Opp. at 1].

I. Background

The State of Missouri imposes a sales tax on gross receipts from selling, leasing, or renting certain items at retail, or for providing certain taxable services. *See* MO.REV. STAT. § 144.020.1 (1997).

Missouri also imposes a use tax on items purchased in other states but consumed in Missouri. *See id.* §144.610. The rate for Missouri's sales and use tax is 4.225% of the assessed value of the item. *See id.* §§ 144.020(1) and 144.610.1 (1997). Most of the revenue from these taxes is deposited in the state general revenue fund, *see id.* § 144.700.1, but one cent per dollar is distributed to local public school districts, *see id.* § 144.700.1; § 144.701. Missouri businesses are subject to the tax unless they are specifically exempted from it, and approximately 80,000 businesses paid sales and use taxes to Missouri in 1997. [*Compare* Def.'s Mot., Uncontroverted Material Faces, ¶ 3, *with* Pl.'s Opp. at 1 ("BNSF does not dispute any of the facts contained in the Director's statement of uncontroverted material facts.")]

The sale and consumption of diesel fuel and gasoline may be subject either to sales and use taxes or to fuel excise taxes. Railroads pay sales and use taxes on their gasoline and diesel fuel. *See id.* §§ 142.010(6); 142.362(6). When diesel fuel and gasoline are used in motor vehicles, however, they are exempt from sales and use taxes and subject to the excise tax. *See id.* §§ 142.010(5)(1); 142.020.1; 142.362(9);

142.372. The excise tax on motor vehicle fuel is $0.17 per gallon. *See id.* §§ 142.025; 142.372. Revenues from the motor vehicle fuel tax are deposited into the state highway fund. *Id.* § 142.345.1.

Missouri also imposes sales and use taxes on aviation jet fuel. These taxes are capped at $1.5 million for interstate common carriers by air that have a "direct pay" agreement with the Missouri Department of Revenue. [*Compare* Compl. at ¶ 15 *with* Answer at ¶ 16]. Finally, an exemption to the sales and use taxes exists for ships, barges, or vessels that primarily transport property or workers on rivers when the fuel is delivered by the seller to the vessel while it is on the river.

Missouri has imposed sales and use taxes on BNSF's purchase and consumption of diesel fuel and gasoline used for rail transportation in Missouri. BNSF has not paid these taxes since 1995, asserting that the tax violated the 4-R Act. BNSF has also filed for a refund of the sales and use taxes it paid between March 1992 and February 1995. The Director denied this claim for a refund, and the Plaintiff has not asked this Court to grant it. BNSF alleges that Missouri's sales and use taxes are discriminatory because the State gives the railroads' competitors preferential tax treatment.

II. Summary Judgment Standard

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant who moves for summary judgment bears the burden of showing that there is no genuine issue of material fact for trial. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 256 (1986). When considering a motion for summary judgment, a court must scrutinize the evidence in the light most favorable to the nonmoving party and the nonmoving party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991) (citation omitted). The main purpose of a motion for summary judgment, however, is to identify factually unsupported claims. If a plaintiff has the burden of proof at trial on a claim and the defendant has filed a motion for summary judgment, the plaintiff must identify admissible evidence sufficient to make a submissible case at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If the plaintiff cannot identify such facts, the defendant is entitled to judgment as a matter of law. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884 (1990) (quoting *Celotex*, 477 U.S. at 322, *cert. denied*, 484 U.S. 1066 (1998)).

To establish a genuine issue of fact sufficient to warrant trial, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,475 U.S. 574, 586 (1986), *cert. denied*, 481 U.S. 1029 (1987). Instead, the nonmoving party bears the burden of setting forth specific facts showing there is a genuine issue for trial. *Anderson*, 477 U.S. at 248 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, *reh'g denied*, 393 U.S. 901 (1968).

III. Jurisdiction

Although the parties did not brief the issue of jurisdiction in their Motions, the Director did raise the issue of Eleventh Amendment immunity in her Answer. [¶¶ 39-40]. The Court will, therefore, address this issue before proceeding to the merits.

The Director's Answer alleges that this Court lacks subject matter jurisdiction to award declaratory or injunctive relief concerning taxes that have already been assessed but not yet collected. Because the Plaintiff brought this suit against the Director in her official capacity, the jurisdictional issue falls under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Generally, the Eleventh Amendment does not bar suits against such defendants for "prospective injunctive relief to prevent a continuing violation of federal law," but it does bar suits for retrospective relief. *See Green*, 474 U.S. at 68 (quoting *Ex parte Young*, 209 U.S. 123, 159 (1908)).

Because BNSF seeks relief from taxes that have been assessed but not yet collected, this Court must determine whether such relief would be prospective or retrospective. Although the Eleventh Amendment prohibits federal courts from awarding damages in a suit against state officers in their official capacities, it allows courts to enjoin the collection of unpaid taxes that have already been assessed. *See CSX Transp., Inc. v. Board of Pub. Works of State of W. Va.*, 138 F.3d 537 (4th Cir. 1998.). In *CSX Transportation*, state officials argued that because they had already assessed taxes on the plaintiff, an injunction under the 4-R Act against collecting the taxes would be retrospective relief. In effect, the injunction would function as a "disassessment." *Id.* at 541. The Fourth Circuit rejected this argument, reasoning:

> The Board in effect argues that an injunction against the future collection of illegal taxes is retrospective and unavailable merely because the state has already decided how much tax to collect, even though the money is still safely in a taxpayer's pocket. If we were to accept this argument, no injunction could issue pursuant to *Ex parte Young* if the action to be enjoined has already been decided

> upon by a state official. But, of course, plaintiffs have no way to know that they must sue to enjoin an official's action until after the official has decided to take that action. . . . It is of no import that the state officials have already decided how much money they want illegally to collect, nor that the state will have to expend its own funds to make up for the funds it was not allowed illegally to collect. The point is that future collection is illegal. Section 306 not only prohibits discriminatory tax assessments, but specifically prohibits the collection of any tax based upon such an assessment. *See* 49 U.S.C § 11501(b)(2). Injunctive relief is available under *Ex parte Young* to prevent such a future violation of federal law.

Id. at 542-43. For this reason, BNSF may proceed in their suit against the Director under the doctrine of *Ex parte Young*.

IV. Discussion

Congress passed the 4-R Act to revitalize the railroad industry at a time when the railroads were foundering. *See* S. Rep. No. 1483, 90th Cong., 2d Sess. 1 (1968). Congress noticed that one of the difficulties railroads faced was a lack of funds and determined that discriminatory state taxation had partially caused this problem. *See* S. Rep. No. 91-630, 91st Cong., 1st Sess. 1, 3 (1969). Section 306(1) of the Act protected railroads from discriminatory state taxation, forbidding states to:

> (c) Assess rail transportation property at a value that has a higher ratio to the true market value

of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(d) Levy or collect a tax on an assessment that may not be made under paragraph (a) of this subsection.

(e) Levy or collect an ad valorem property tax on rail transportation property at a rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(f) Impose any other tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

Pub. L. No. 94-210, 90 Stat. 31 at 54 (codified at 49 U.S.C § 11501(b) (1997).[1] Subsections (a), (b), and (c) of the statute prohibit discrimination in property taxes relative to other "commercial and industrial" taxpayers, while (d) forbids "any other tax that discriminates against a rail carrier." *Id.* The Plaintiff in this case proceeds under subsection (1)(d).

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[1]The Court uses the original language of § 306, rather than the codified version, pursuant to the Eighth Circuit's opinion in *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302 (8th Cir. 1991), *cert. denied*, 502 U.S. 856 (1991).

(a) The Comparison Class

The parties disagree about how discrimination under subsection (1)(d) of the statute should be measured. The Director insists that the relevant groups for comparison are railroads versus all other commercial and industrial taxpayers. BNSF urges the Court to compare railroads to their competitors. As noted above, the 4-R Act does not specifically address the appropriate comparison class for subsection (1)(d).

Generally, the courts have found commercial and industrial taxpayers to be the proper comparison class under subsection (1)(d). *See, e.g., Burlington Northern R.R. Co., Inc. v. Bair*, 60 F.3d 410, 413 (8th Cir. 1995), *cert. denied*, 516 U.S. 1113 (1996); *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 417 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) (using this comparison class). Courts tend to use this class because it is the comparison class defined by Congress in subsections (a) to (c). *See Burlington Northern R.R. Co. v. Huddleston*, 94 F.3d 1413, 1417 (10th Cir. 1996) ("we can think of no sound reason why Congress did not intend the same class to be used in analyzing discrimination claims under subsection (1)(d)"); *accord Chesapeake and Ohio Ry. Co. v. Rose*, 651 F.Supp. 1463 (S.D.W.Va. 1985), *aff'd*, 809 F.2d 785 (4th Cir.1987).

Another reason to compare the taxation of railroads to that of commercial and industrial taxpayers lies in the legislative history of the statute. Congress prohibited discriminatory taxation of railroads because it believed that railroads lacked the political power to protect themselves from unfair taxes. *See Western Air Lines, Inc. v. Board of Equalization of State of S.D.*, 480 U.S. 123, 131 (1987). Congress saw that railroads were vulnerable to state legislatures because they were "'nonvoting, often nonresident,

targets for local taxation' who cannot easily remove themselves from the locality." *See id.* (quoting S. Rep. No. 91-630, p.3 (1969). To determine whether a legislature has discriminated against railroads, therefore, courts compare their tax treatment to that of a large group of taxpayers, including those who are politically powerful enough to protect their interests. *See Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). If railroads are treated as well as most other commercial and industrial taxpayers, it is safe to assume that a state has not taken advantage of the railroads' political weakness to impose a discriminatory tax on them: "A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden. The class of [railroads and their competitors] is simply too small and too foreign to fulfill this function." *Id.*

There is also substantial support in the cases for comparing the tax treatment of railroads to that of other commercial and industrial taxpayers in those cases where a tax burdens railroads and their competitors more than commercial and industrial taxpayers. For example, a state violates the 4-R Act when it imposes a tax only on public utilities, including railroads, but not other commercial and industrial taxpayers. *See McNamara*, 817 F.2d at 375. Also, a state discriminates against railroads when it imposes a special tax on carriers of cargo and laborers that does not apply to other commercial and industrial taxpayers. *See Chesapeake and Ohio Ry. Co.*, 651 F. Supp. at 1466.

A slightly different question is presented in cases like this one, however, where railroads' competitors are allegedly taxed more favorably than both railroads and most other commercial and industrial taxpayers. Using commercial and industrial taxpayers as a comparison class in such cases would reveal no discrimination, because most commercial and

industrial taxpayers pay the same taxes as the railroads. Nevertheless, a tax that imposes greater burdens on railroads than on the railroad's competitors could have a negative impact on the financial health of the railroad. Not surprisingly, courts are divided on what comparison class to use in such cases. *Compare Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338, 346 (Iowa), *cert. denied*, 465 U.S. 1071 (1983) (holding that competitors were the correct comparison class) *with Atchison, Topeka and Santa Fe Ry. Co. v. State of Ariz.*, 78 F.3d 438 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996) (holding that commercial and industrial taxpayers were the correct comparison class). Because of their similarity to this case, these precedents merit further consideration.

In *Bair*, the state imposed an excise tax solely on fuel used by railroads. *See* 338 N.W.2d at 341. The state allocated these funds to a state agency created to assist financially troubled rail carriers. *Id.* at 340. Because the tax was imposed on propulsion fuel used by railroads, the court compared it to the tax on propulsion fuel used by the railroads' competitors - trucks, barges, and airplanes. *Id.* at 346. The court reasoned, "the present excise tax must be nondiscriminatory compared with fuel taxes on any of these other modes so as to avoid a competitive disadvantage." *Id.*; *accord Burlington Northern R.R. Co. v. Comm'r of Rev.*, 509 N.W.2d 551, 553 (Minn.1993) (sales and use tax); *Burlington Northern R.R. Co. v. Triplett*, 682 F. Supp. 443, 445 (D. Minn. 1988) (applying *Bair*'s reasoning to a fuel tax case). The court found that the 4-R Act established a national policy to "foster competition among all carriers by railroads and other modes of transportation." *See id.* at 341 (quoting 45 U.S.C. § 801(b)(1) (1982 Supp.)). When Congress passed the Act, the railroad industry was foundering because of "too much track chasing too little traffic." *Id.* at 340. Congress responded by prohibiting discriminatory state taxation,

providing federal funding for railroad improvement, and helping railroads abandon unprofitable lines. *Id.* Because one of Congress' purposes in passing the 4-R Act was to make railroads more competitive with trucks, barges, and airplanes, it is likely that Congress intended to prohibit states from taxing railroads more than their competitors.

In *Atchison, Topeka & Santa Fe*, however, the court relied on legislative intent to reach the opposite result. *See* 78 F.3d at 442. In this case, a railroad argued that a state violated the 4-R Act by exempting motor fuel from its sales tax. *Id.* at 439. Motor fuel was taxed under a separate tax scheme, and the proceeds were used to improve roads. *Id.* at 439, 443. The court reasoned that Congress never intended to guarantee that railroads receive the most preferential tax treatment a state offers, but only to ensure that railroads were not taxed more than commercial and industrial taxpayers generally. *Id.* The court cited the Senate Report on the 4-R Act, which explained:

> This proposed antidiscrimination tax bill, which would be available to all common carriers engaged in interstate commerce, has the obvious merit of insuring that such carriers would receive equal treatment with other taxpayers subject to the same tax rates in accordance with applicable State law. The proposal in no way alters the freedom of the State to tax its taxpayers as in its discretion it deems best, so long as such carriers are accorded equal tax treatment with other taxpayers.

Id. at 442 (quoting S. Rep. No. 445, 87th Cong., 1st Sess. 465-66 (1961)). In light of this legislative history, the court reasoned that comparing railroads only to motor vehicles

would force the state to give railroads preferential treatment relative to other commercial and industrial taxpayers. *Id.* After all, commercial and industrial taxpayers were subject to the sales tax, and the railroad was asking for an exemption that only motor vehicles enjoyed. The court concluded that "[i]n order for railroad carriers to receive equal treatment with other taxpayers subject to the same tax law, they must be compared to all others subject to the tax in question, not just compared to motor carriers." *Id.*

It is possible, however, for Congress to have multiple goals in passing a statute. The legislative history of the 4-R Act shows that Congress intended to ensure equal taxation of railroads and commercial and industrial taxpayers. At the same time, Congress also intended to revitalize the railroad industry by making it more competitive with trucks, barges, and airplanes. It is these competing objectives that make it difficult to define the proper comparison class for evaluating claims under the 4-R Act. One way to harmonize these Congressional objectives is to determine if a railroad has been singled out from among its competitors for discriminatory taxation, while keeping in mind that Congress did not intend to require states to provide railroads with preferential tax treatment.

Like the states in *Bair* and *Atchison, Topeka & Santa Fe*, Missouri exempts motor fuel from its sales and use tax. Motor fuel is instead taxed at a higher rate and dedicated to improving roads. Missouri also imposes the tax on airplane fuel, but caps airlines' liability at $1.5 million in certain circumstances. Finally, Missouri exempts fuel delivered to barges on rivers from the tax. The Court will consider these issues in turn.

First, BNSF alleges that Missouri discriminates against it because the State sets aside revenue from taxes on motor

fuel for improving roads, but allocates funds from taxes on railroad fuel for general purposes. BNSF argues that these expenditures place railroads at a competitive disadvantage, because railroads pay the cost of maintaining their own tracks. How a state spends its tax revenues, however, is irrelevant to whether a tax is discriminatory under § 306. *See Trailer Train Co.*, 929 F.2d at 1303. In *Trailer Train Co.*, the Eighth Circuit held that "the use of the proceeds of a tax has no bearing on the question of whether a tax is discriminatory"; *accord Atchison, Topeka and Santa Fe Ry. Co.*, 78 F.3d at 443 (holding that "the 4-R Act reaches only tax burdens and not tax benefits," and rejecting railroads' argument that tax was discriminatory because taxes imposed on motor vehicles were used to repair roads). Furthermore, the tax on motor fuel is $0.17 per gallon, while the sales and use tax is only 4.225%. Assuming that fuel sells for one dollar per gallon, the tax rate on motor fuel is more than four times the rate on railroad fuel. BNSF has provided no documentation to show how a tax on trucks which is four times greater than the tax on railroads, actually works to the advantage of the trucking industry.

BNSF argues that the holding *Trailer Train Co.* only applies to cases where it is the state taxing authority which claims equality of burden even though a tax on its face discriminates against a railroad. The reasoning of the court in *Trailer Train Co.* does not permit such a narrow reading, given its emphasis on the need for bright line rules that promote "simple judicial administration." *Trailer Train Co.*, 929 F.2d at 1303. To evaluate the relative burden of fuel taxation on railroads versus trucks would require the Court to engage in a lengthy analysis of how state services support the railroads and the extent to which trucks actually benefit from

state dollars used to build roads.[2] This is exactly the kind of inquiry rejected by the Court in *Trailer Train Co.*, which focused instead of on the question of whether the tax statute was facially discriminatory. On its face, the Missouri fuel tax favors railroads when compared to the trucking industry.[3]

Next, the Court will consider the taxation of airlines. Airlines actually pay the same tax rate as railroads, but their annual liability is capped at $1.5 million if they enter a direct-pay agreement with the state. Because airlines and railroads shoulder very similar tax burdens, BNSF emphasizes that most of its competition comes from barges and motor vehicles. [*See* Report of William W. Whitehurst at 2-3]. Because BNSF itself states that airlines are not significant competitors with railroads, this Court considers the slight tax preference given to airlines to be insignificant as well. Furthermore, BNSF has failed to show that it or any railroad pays more than $1.5 million in fuel taxation which would be the only way in which the airlines would be at a competitive advantage over the railroad.

This leaves barges. Barges pay no sales and use tax on fuel when it is delivered to them on a river. The Court, having considered at length Congress' goals in passing the 4-R Act, finds that this difference in tax treatment is too

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[2]The federal government contributes to the construction of roads in Missouri.

[3]*Triplett*, having been decided before *Trailer Train Co.*, is no longer persuasive and the Supreme Court of Minnesota in *Burlington Northern R.R. Co.*, 509 N.W.2d at 553, apparently was unaware of *Trailer Train Co.*, since it cited only to *Triplett*. The Minnesota Supreme Court also noted that the inquiry under the 4-R Act should focus on whether the tax was facially discriminatory.

minimal to constitute illegal discrimination. This is not a case where railroads are placed at a disadvantage relative to all of their competitors or even relative to a number of their competitors. It is a case where BNSF seeks the same preferential treatment given to barges, a single competitor. *Compare Atchison, Topeka & Sante Fe*, 78 F.3d at 442. This is not a case where Missouri took advantage of BNSF's lack of political power to impose an unfair tax burden on the railroad. More than 80,000 taxpayers in Missouri, some of whom are undoubtedly politically powerful, pay the same sales and use tax rate as BNSF. *Compare McNamara*, 816 F.2d at 375.

The cases relied on by BNSF are distinguishable. In *Burlington Northern R.R. Co. v. City of Superior, Wis.*, 932 F.2d 185 (7th Cir. 1991) the Wisconsin tax in question clearly targeted railroads and was paid by no other entity in the state. *Ogilvie v. State Board of Equalization of State of N.D.*, 492 F. Supp. 446 (D.C.N.D. 1980), *aff'd*, 657 F.2d 204, *cert. denied*, 454 U.S. 1086 (1981) is distinguishable because it dealt with a tax system which imposed a higher assessment ratio on railroads than on any other taxpayer. Finally, *National R.R. Passenger Corp. v. State Bd. of Equalization of State of Cal.*, 652 F. Supp. 923 (N.D. Cal. 1986), involved a state use tax that applied only to passenger train cars, a narrow target indeed. None of these cases are factually analogous to the matter now before the Court.

The 4-R Act does not require a state to give railroads the best taxation deal that is given to any of its competitors or to any other small group of taxpayers. If that were the rule, then Congress substantially impaired the ability of the states to tax railroads. There will always be some group in every category of comparison constructed by BNSF that is being treated more favorably than the railroad. Perhaps the 4-R Act was a devious way for Congress to transfer to the

state a major share of the cost of revitalizing the railroads, but there is nothing in the statute that mandates that assumption and common sense suggests otherwise. Missouri's fuel tax scheme as applied to railroads does not violate the 4-R Act.

(b) Exemptions from a Generally Applicable Tax

There is a related reason why BNSF loses this case. The Supreme Court has held that exemptions from a generally applicable tax never constitute discrimination under the 4-R Act. *See Department of Rev. of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994). In *ACF Industries*, the State of Oregon enforced an *ad valorem* property tax, but exempted "agricultural machinery and equipment; nonfarm business inventories; livestock; poultry; bees; fur bearing animals; and agricultural products in the possession of farmers." *Id.* at 335. ACF Industries claimed that, because railroads were not also given an exemption, Oregon's scheme violated subsection (1)(d) of the 4-R Act. *Id.* at 340. The Court noted that subsections (1)(a) to (c) forbid states from treating "commercial and industrial property" more favorably than railroad property. *Id.* The Court then looked to the definition of this term: "'commercial and industrial property' means property, other than transportation property and land used primarily for agricultural purposes of timber growing, devoted to a commercial or industrial use and subject to a property tax levy." *Id.* at 340 (quoting 49 U.S.C. § 11501(a)(4)). The Court found it significant that the definition of commercial and industrial property allowed states to tax railroad property at a higher rate than agricultural property. *Id.* The statute, therefore, did not classify this exemption as discriminatory. The Court also interpreted the phrase "subject to a property tax levy" to mean property that is actually taxed. *Id.* at 341 (reasoning that the phrase had

that meaning earlier in the statute, in subsection (1)(a)). The Court concluded that:

> Because property "subject to a property tax levy" means property that is taxed, the definition of "commercial and industrial property" excludes property that is exempt. Exempt property, then, is not part of the comparison class against which discrimination is measured under subsections [(1)(a)-(c)], and it follows that railroads may not challenge property tax exemptions under those provisions.

Id. at 342. Relying on this language in Subsection (1)(a), the Court concluded that exempt property was not part of the comparison class for suits under subsection (1)(d). The Court reasoned, "it would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections [(1)(a)-(c)], would turn around and nullify its own choice in subsection (1)(d)." *Id.* The Court also relied on legislative history and principles of federalism to support this conclusion. *Id.* at 345.

Because "exemptions from a generally applicable tax" do not constitute discrimination under the 4-R Act, the Court must discern the difference between permissible exemptions and impermissible discrimination. ***ACF Industries*** does not permit a state to "exempt" all commercial and industrial property from taxation except that held by railroads. If sweeping exemptions "single out [railroads] for discriminatory treatment," then they violate the 4-R Act, ***ACF Indus.***, 510 U.S. at 346; *accord* ***Bair***, 60 F.3d at 413. (A tax is discriminatory if most taxpayers are exempt and only a small group is taxed.) In ***Bair***, for example, Iowa only taxed personal property if it is owned by public utilities. All other

personal property was exempt. *See id.* at 411-12. The *Bair* court explained Iowa was not exempting some property from a tax of general application, but rather singling out railroads and other public utilities for discriminatory treatment. *Id.* at 413.

Missouri's sales and use tax applies to more than 80,000 businesses in the state. BNSF would be hard-pressed to prove that "railroads - either alone or as a group - are the only commercial entities subject to [the tax]," or that they were "singled out for discriminatory treatment." *ACF Indus.*, 510 U.S. at 346. Missouri's sales and use tax is generally applicable. For this reason, the exceptions for airlines, barges, and motor vehicles do not constitute discrimination against railroads.

The Plaintiff seeks to distinguish *ACF Industries* away by pointing out that Missouri's tax is a sales and use tax, rather than a property tax. It argues that the Supreme Court's reasoning is limited to property tax cases because the Court reasoned that Congress would not have allowed exemptions in property taxes in subsections (a) to (c) and then prohibited them in subsection (d). While this was one of the Supreme Court's reasons why the 4-R Act did not prohibit states from granting exemptions from a generally applicable tax, it was not the only one. In upholding the States' power to grant tax exemptions, the Supreme Court relied in part on "[p]rinciples of federalism." *See ACF Indus.*, 510 U.S. at 345. The Court noted:

> Subsection [(1)(d)], like the hole of [§306, codified at] § 11503, sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty [citations omitted]. When determining the breadth of a federal statute

> that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope.

Id. Therefore, the Court reasoned, if Congress had intended to restrict the States' power to grant property tax exemptions, it should have done so explicitly. *Id.*

This logic applies with equal force to sales and use taxes. *See Atchison, Topeka and Santa Fe Ry. Co.*, 78 F.3d at 443. In *Atchison, Topeka and Santa Fe*, a railroad challenged a 5% tax on the sale of goods and services in Arizona. *Id.* at 339. Motor carriers were exempt from this tax because they were subject to a different tax scheme. *Id.* The Ninth Circuit, the only federal appellate court to rule on this issue, rejected the distinction between sales taxes and property taxes. *Id.* at 443. The court held that "because Congress did not explicitly prohibit states from carving out exemptions from their sales and use taxes, such exemptions are permissible." *Id.* at 443. For this reason, Missouri's exemption from its sales and use taxes do not violate § 306.

V. Conclusion

Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment (Doc. #27) is GRANTED. It is further

ORDERED that Plaintiff's Motion for Summary Judgment (Doc. #30) is DENIED.

/s/ Nanette Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: 11-20-98
Kansas City, Missouri

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1027WMJC

Burlington Northern and Santa Fe Railway Company,
Appellant,

v.

Janette M. Lohman, Director, Department of Revenue of the State of Missouri,
Appellee.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 26, 1999

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAR 29 2000
CLERK

(2)

No. 99-1424

IN THE
SUPREME COURT OF THE UNITED STATES

**QUENTIN WILSON, DIRECTOR
DEPARTMENT OF REVENUE OF THE STATE OF MISSOURI,
Petitioner,**

v.

**BURLINGTON NORTHERN
SANTA FE RAILWAY COMPANY,
Respondent.**

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit**

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent restates the Question Presented as follows:

Does Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501, prohibit the imposition of a sales and use tax on railroad diesel fuel, when no other type of carrier is subject to the same tax imposed in the same way on its fuel?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of this Court, respondent states the following:

Burlington Northern Santa Fe Railway Company is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, a publicly held corporation. Burlington Northern Santa Fe Railway Company's nonwholly-owned subsidiaries are:

Alameda Belt Line
The Belt Railway Company of Chicago
Central California Traction Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Longview Switching Company
MT Properties, Inc.
Oakland Terminal Railway
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
St. Joseph Terminal Railroad Company
Sunset Railway Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
TTX Company
Wichita Union Terminal Railway Company

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 99-1424

QUENTIN WILSON, Director
Department of Revenue of the State of Missouri,
Petitioner,
v.
BURLINGTON NORTHERN
SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are adequately identified in the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. NO. 94-210 (1976) ("Section 306"), now codified at 49 U.S.C. § 11501. Section 306(1)(d), the specific subdivision applicable in this case, prohibits the imposition of "any other tax that discriminates against common carriers by rail." The same provision as codified, § 11501(b)(4), states that a state, subdivision of a state, or authority acting for a state or subdivision, may not impose "another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." Although the language of Section 306 as codified differs slightly from the language of Section 306 as originally enacted, the codification was not intended to make any substantive change to the meaning of Section 306.

STATEMENT OF THE CASE

The Respondent amends and expands upon the Petitioner's Statement of the Case as follows:

This case is a civil action seeking injunctive and declaratory relief from the Petitioner, Director of Revenue of the State of Missouri ("Director"), seeking to enjoin him from assessing, levying, or collecting sales and use taxes imposed on Respondent Burlington Northern Santa Fe Railway Company ("BNSF") on fuel used in its transportation business in the State of Missouri. BNSF contended that these taxes violate Section 306(1)(d).

Missouri imposes sales tax on the gross receipts from selling, leasing, or renting certain tangible items at retail, or

from providing certain taxable services in Missouri. Missouri also imposes a use tax that complements and is similar to the sales tax. Missouri sales and use taxes are generally based on the retail price of the taxable item or service. The Missouri sales and use tax rate is 4.225% of the retail price for most taxable items. (An additional state use tax rate of 1.5% was repealed in 1996.)

The sale or consumption of petroleum products in Missouri may be subject to either the fuel excise taxes imposed by RSMo. Chapter 142, or to sales and use taxes imposed by RSMo. Chapter 144. Railroads are subject to Missouri sales and use taxes on their diesel fuel and gasoline used within the State of Missouri. Missouri sales and use taxes are also imposed on purchases of aviation jet fuel. Before the repeal of the state additional use tax rate of 1.5%, however, aviation jet fuel was exempt from that additional rate. Air carriers are still exempt from any state or local sales or use tax imposed after December 30, 1987, and from any increase in any state or local sales or use tax rate which was not in effect as of December 30, 1987, on the purchase, storage, or use of aviation jet fuel at any Missouri airport which receives or is eligible to receive federal grant funds. RSMo. § 144.809. In addition, interstate common carriers by air that have a direct pay agreement with the Department of Revenue pay a maximum aggregate amount of $1.5 million of state sales and use taxes in each calendar year. Finally, as of September 1, 1998, all sales and use tax revenues upon aviation jet fuel up to a total of $5,000,000 in a calendar year are deposited into the aviation trust fund. RSMo. § 144.805(4). This trust fund is to be used for the planning, acquisition, construction, improvement, or maintenance of airports, or for other aeronautical purposes. RSMo. § 305.230.

Sales of fuel consumed or used by ships, barges, or vessels that primarily transport property, cargo, or persons for hire on navigable rivers bordering on or located in part in Missouri are exempt from sales and use taxes if the fuel is delivered by the seller to the purchaser's vessel while it is on the river. Fuel used by ships and barges is also not subject to the excise taxes on fuel, since it is not used on the highway. Therefore, none of the fuel used by ships and barges in foreign or interstate transportation is subject to taxation.

RSMo. Chapter 142 imposes petroleum excise taxes on motor fuel (gasoline) and "special fuel" (a statutory term that includes diesel fuel, liquefied petroleum gas, and other similar substances) sold for use in propelling motor vehicles on the highway. The motor fuel and special fuel taxes were imposed at the rate of 15¢ per gallon as of April 1, 1994, and 17¢ per gallon as of April 1, 1996. Proceeds of the motor fuel and special fuel excise taxes are paid into the state highway fund.

BNSF owns its rights-of-way in Missouri. It must build its own tracks, and then maintain and repair those tracks at its own expense. In addition to the sales and use taxes BNSF pays on its fuel, BNSF must pay sales and use taxes on the purchase and installation of all of the materials it uses to maintain and repair its track structure. Because BNSF owns its own track structure, as well as the roadbed on which it is built, BNSF is fully subject to ad valorem taxes on that property in the State of Missouri.

BNSF's principal transportation competitors are motor carriers and barge lines. Air carriers also compete with railroads such as BNSF, but to a lesser extent. Motor carriers, barge lines, and air carriers do not acquire, construct, maintain,

and pay ad valorem taxes on the rights-of-way they use for transportation purposes.

Based on these facts, most of which were stipulated by the parties, both parties filed motions for summary judgment in the district court. The district court issued its ruling on November 20, 1998, granting the Director's motion for summary judgment and denying BNSF's motion. The court ruled that use of tax proceeds could not be considered when determining whether a tax discriminated against a railroad in violation of Section 306. When consideration of the use of tax proceeds was eliminated from the case, the court found that the tax was not discriminatory when analyzed using a "competitive mode" comparison class. The court ruled further that exemptions from a generally applicable tax could never constitute discrimination under Section 306. BNSF appealed this decision to the United States Court of Appeals for the Eighth Circuit.

The Eighth Circuit reversed, holding that Missouri's sales and use taxes as imposed on railroad diesel fuel did in fact result in discriminatory treatment of a common carrier by rail, and thus violated Section 306(1)(d). The Eighth Circuit ruled that there was no comparison class specified by Congress for cases brought under Section 306(1)(d), and that therefore the courts could use the comparison class most appropriate to test the specific discrimination being alleged in the case. In this case, the Eighth Circuit found that the most appropriate comparison class was a class composed of competing transportation modes. The court further ruled that it did not need to address the entire taxing structure of the State of Missouri, but rather could confine its analysis to the specific tax at issue, the sales and use tax. Under this analysis, the Eighth Circuit held that Missouri's sales and use tax on railroad

diesel fuel resulted in discriminatory treatment of a common carrier, and therefore violated Section 306(1)(d).

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. BNSF respectfully submits that the Petition should be denied.

1. No Special or Important Reasons Exist for Granting the Writ

a. The Comparison Class Issue Has No Application Beyond Cases Brought Under Section 306(1)(d)

The Director cites three reasons for this Court to grant certiorari in this case. Of the three reasons, only one concerns an actual conflict between the decision of the Eighth Circuit and the decision of another Court of Appeals, and that issue hardly rises to the level of seriousness or importance which would require the intervention of this Court.

In this case, the Eighth Circuit expressly disagreed with the Ninth Circuit regarding which comparison class should be used in testing for discrimination in a non-property tax case brought under Section 306(1)(d). *See* Appendix to Petition at A-4, 5; *Atchison, Topeka & Santa Fe Railway Co.*, 78 F.3d 438 (9th Cir.), *cert. denied sub nom. Arizona Central R.R. v. Arizona*, 519 U.S. 1029 (1996). This question, however, is simply a matter of statutory interpretation concerning one subsection of Section 306. The Eighth Circuit ruled that Congress did not mandate any specific comparison class to be used under Section 306(1)(d), as opposed to the "other

commercial and industrial property" comparison class to be used under Sections 306 (1)(a), (b), and (c). Therefore, "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case." Appendix to Petition at A-4.

In this case, the Eighth Circuit noted that railroad companies in Missouri are subject to a generally imposed non-property tax, while their direct competitors are not. Appendix to Petition at A-5. Because this placed railroads at a competitive disadvantage with other carriers, the court determined that the most appropriate comparison class would be the railroads' competing transportation modes. It then applied the stipulated facts of the case at hand to the statutory provision, and made its ruling.

This ruling has no precedential effect outside of railroad tax cases. The statutory provision involved, Section 306(1)(d), has no additional application. In addition, Section 306(1)(d) is not the model for any other statute.[1] Therefore, the Eighth Circuit's decision applies to a very small category of cases, with no impact on the vast majority of other taxpayers or other litigants.

Even if the decision were wrong, therefore, this case does not present the type of serious issue of national import that would justify this Court's grant of certiorari. In addition, however, the Eighth Circuit's decision is correct. Section 306 contains four substantive subsections prohibiting discriminatory taxation. Three of those subsections deal exclusively

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[1] Neither the anti-discrimination statute applicable to air carriers, 49 U.S.C. § 40116(d), nor the anti-discrimination statute applicable to motor carriers, 49 U.S.C. § 14502, contains a provision analogous to Section 306(1)(d).

with property taxes, and include reference to a specific comparison class, "other commercial and industrial property." The fourth, Section 306(1)(d), prohibits "any other tax" which results in discriminatory taxation of a railroad, and does not state what comparison class should be used.

In *Santa Fe v. Arizona*, the Ninth Circuit erroneously analogized Section 306(1)(d) to the three property tax provisions, Sections 306(1)(a), (b), and (c). Based on the "other commercial and industrial property" comparison class used in those three subsections, the Ninth Circuit chose to create a new comparison class for cases brought under Section 306(1)(d): other commercial and industrial taxpayers *subject to the same tax*. That comparison class, of course, does not appear anywhere within the text of Section 306, and is contrary to the overwhelming weight of other authorities who have discussed the comparison class issue.

The *Santa Fe v. Arizona* decision includes a strong dissent which concisely shows why there is no problem harmonizing non-property tax cases using the competitive mode class with property tax cases subject to the "other commercial and industrial property" comparison class. Unlike the two-judge majority, the dissenting judge refused to "provide for an exclusive comparison class under Section 306(1)(d) when *Congress explicitly chose not to do so.* Finding that Section 306(1)(d) only permits the broad comparison class does not interpret the 4-R Act, but amends it." 78 F.3d at 445 [emphasis added]. In other words, by creating a mandatory and exclusive comparison class for use in cases brought under Section 306(1)(d), the court actually rewrote the statute, adding new language that does not appear in the statute as Congress enacted it.

The analysis used by the Eighth Circuit in this case has been adopted by other courts confronting the issue of railroads being taxed disadvantageously compared to their direct competitors. *See, e.g., Burlington Northern R.R. Co. v. Commissioner of Revenue*, 606 N.W.2d 54 (Minn. 2000); *Burlington Northern R.R. v. Commissioner*, 509 N.W.2d 551 (Minn. 1993); *Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338 (Iowa 1983), *cert. denied*, 464 U.S. 1671 (1984); *Burlington Northern R.R. Co. v. Triplett*, 682 F.Supp. 443 (D. Minn. 1988); *National Railroad Passenger Corp. v. State Board of Equalization*, 652 F.Supp. 923 (N.D. Cal. 1986). Therefore, the Eighth Circuit's decision in this case is in accord with the great weight of authority.

As the Eighth Circuit correctly pointed out in this case, when applying Section 306(1)(d), the focus must be on the resulting discrimination. BNSF's major non-railroad competitors do not pay comparable sales and use taxes on fuel they use in their transportation businesses. This puts railroads at a direct competitive disadvantage, thus resulting in discriminatory treatment of common carriers by rail. The Eighth Circuit has correctly applied the law in this case, and its decision should remain undisturbed.

b. Neither Congress Nor the Eighth Circuit Has Limited the States' Taxing Authority

The Eighth Circuit held in this case that it could limit its analysis in this case to sales and use taxes. The Director now claims that this ruling has "eliminated" the states' ability to structure taxation to address differences among competitors. This overwrought argument ignores both this Court's rulings on when it is appropriate to make comparisons between

different types of taxes, and the actual nature of the taxes at issue in this case.

Motor carriers in Missouri are subject to tax on their motor fuel, but it is a different tax from that paid by railroads, imposed in a different manner, at a different rate, and for a different purpose. The fuel excise taxes paid by motor carriers are used exclusively for the construction and maintenance of highways, which are of course the primary rights-of-way used by the motor carriers. In other words, the fuel excise tax is a user fee, by which the State of Missouri can at least partially collect the cost of its public highways from those who use them. Railroads do not use the public highways, and hence are not subject to the tax.[2] Rather, railroads pay a pure revenue raising tax whose proceeds are paid into the general fund, and in addition must pay to build and maintain (and pay taxes on) their own rights-of-way.

In the courts below, the Director wanted to compare the rate of tax paid by the motor carriers and the railroads, while completely barring any discussion of the vastly different purposes and uses of the fuel excise tax and the sales and use taxes as imposed on fuel. BNSF argued that it was unnecessary to look beyond the sales and use taxes, but that if excise taxes were considered, their nature as "user fees" should be taken into account.

When it refused to look beyond sales and use taxes in this case, the Eighth Circuit was in accordance with decisions of this Court declining to analyze the "entire tax structure" of a state when determining if a specific tax is discriminatory. *See*,

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[2] Railroad companies do pay fuel excise taxes on fuel used in company vehicles that travel on public highways.

e.g., *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 149-50 (1979).

In Commerce Clause cases in which a tax is challenged as an unconstitutional burden on interstate commerce, this Court has sometimes looked to other taxes to determine whether a facially discriminatory tax might be considered non-discriminatory, but it has limited its analysis to taxes which are either "complementary" or "substantially equivalent" to the tax being challenged. Substantial equivalence is a strict test, however, and does not simply involve comparing one tax to another to permit discriminatory taxes to pass constitutional muster.

In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), for example, this Court refused to consider the gross sales tax imposed on Armco as a "compensating tax" for the manufacturing tax imposed on its competitors. Similarly, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), this Court refused to consider a tax on the first use in Louisiana of gas brought in from out of state to be a complement of the severance tax in the same amount imposed on gas produced in the state.

Here, the taxes the Director seeks to compare are sales and use taxes, based on the purchase price of the fuel and used for general revenue purposes, and a fuel excise tax, based on the amount of fuel used and earmarked for the specific purpose of building and maintaining the rights-of-way used by the carriers paying the tax.[3] The two taxes are not complementary or

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[3] Another difference between the taxes is their volatility. The recent dramatic increase in the price of diesel fuel has led to a corresponding dramatic increase in the amount of sales and use taxes paid for the purchase of that fuel, since those taxes are based on the purchase price. The excise

substantially equivalent, and the Eighth Circuit was well within this Court's existing case precedent in refusing to compare the two. This decision breaks no new ground, and imposes no new burdens on state tax planning. Therefore, there are no grounds for this Court to grant certiorari in this case.

2. The Second Asserted "Conflict" Is Not Actually a Conflict

The Director asserts that the Eighth Circuit is in conflict with the Ninth Circuit's interpretation of *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), in its *Santa Fe v. Arizona* decision.[4] The *ACF Industries* decision, however, is not applicable to this case.

The specific holding of the *ACF Industries* case is stated as follows:

> We hold that a State may grant exemptions from a generally applicable *ad valorem property tax* without subjecting the taxation of railroad *property* to challenge under the relevant provision of the 4-R Act, § 306(1)(d), 49 U.S.C. § [11501](b)(4).

---

tax paid by motor carriers, however, has not varied at all, since it is based on the number of gallons of fuel purchased.

[4] It is interesting to note that the Director never asserts that the Eighth Circuit is in conflict with this Court's decision in *ACF Industries* itself. Rather, he asserts that the Eighth Circuit is in conflict with the Ninth Circuit's interpretation of the *ACF Industries* decision. This simply confirms that the issues decided by this Court in *ACF Industries* are not relevant to this case.

510 U.S. at 335 [emphasis added]. This holding is repeated at the end of the decision:

> We conclude that § [11501], which expresses Congress' resolution of the matter, does not limit the States' discretion to exempt nonrailroad *property*, but not railroad *property*, from *ad valorem property taxes* of general application.

510 U.S. at 347-48 [emphasis added]. The fact that this Court was considering a property tax in that case not only limits the application of the decision, but also was critical to the logic and reasoning leading to the express holding.

ACF Industries was a property tax case that turned on the definition of "other commercial and industrial property," a phrase which is expressly used in Sections 306(1)(a),(b), and (c), but not in Section 306(1)(d). According to Section 306(3)(c), [§ 11501(a)(4)], "commercial and industrial property is "*property*, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and *subject to a property tax levy*." [Emphasis added.] This Court held that the phrase "subject to a property tax levy" meant "taxed property," and did not mean "taxable property, a broader category consisting of the general mass of property within the State's jurisdiction and power to tax, including property that enjoys a current exemption." 510 U.S. at 341. Therefore, this Court concluded, the definition of "commercial and industrial property" excluded property that was statutorily exempt from tax.

Although the *ACF Industries* decision involved a challenge brought under Section 306(1)(d), the tax being challenged was a property tax. This Court reasoned that Congress could not

have intended to exclude exempt property from consideration in property tax cases brought under the three previous subsections of Section 306 only to have it brought back into the mix in a property tax case brought under the broader language of Section 306(1)(d). None of the Court's analysis of this issue makes any sense in the context of a case brought under Section 306(1)(d) that challenges a sales and use tax, or any tax other than an ad valorem property tax.

Whether or not the *ACF Industries* decision has application in non property tax cases is actually unimportant in this case, however. Once the Eighth Circuit decided that it could properly apply the competitive mode comparison class in its analysis, the question of exemptions became irrelevant. If railroads are the only transportation mode subject to the same tax applied in the same manner on transportation fuel, the tax is clearly discriminatory because railroads have been singled out for the imposition of a tax that their competitors do not pay. The Eighth Circuit neither discussed nor decided whether the Ninth Circuit's ruling concerning "exemptions" was correct, because it did not need to reach that issue. Therefore, there is no true conflict, and no reason for this Court to grant the Petition.

CONCLUSION

None of the issues raised in the Petition merit review by this Court. Although there is a technical conflict between the Eighth and Ninth Circuits on the comparison class issue, this is an issue that has no import beyond railroad tax cases brought under one specific subsection of Section 306. The other two issues present no real conflicts and address matters on which the Eighth Circuit's decision is fully within existing precedent. The Petition does not present any ground for granting certiorari

within the meaning of Rule 10 of the Rules of this Court and should be denied.

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March 29, 2000